92-604

Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

v.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA,

Appellee,

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION OF REAL PARTY IN INTEREST DIRECT TRANSIT, INC.

V. J. McALPIN, ESQ.
State Bar #30549
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Attorney for Real Party In Interest
DIRECT TRANSIT, INC.

September 11, 1992

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QUESTIONS PRESENTED

1) Does the alleged lack of receipt of the judgment by Appellant's attorney amount to a denial of due process?

2) Does the established system of notice utilized by the Workers' Compensation Appeals Board fail to satisfy the requirements of due process?

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MISCELLANEOUS CALIFORNIA RULES AND CODES

California Administrative Code
Title 8, §10520 4

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In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant,

v.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA,

Appellee,

BRIEF IN OPPOSITION OF REAL PARTY IN INTEREST DIRECT TRANSIT, INC.

QUESTIONS PRESENTED

1) DOES THE ALLEGED LACK OF RECEIPT OF THE JUDGMENT BY APPELLANT'S ATTORNEY AMOUNT TO A DENIAL OF DUE PROCESS?

2) DOES THE ESTABLISHED SYSTEM OF NOTICE UTILIZED BY THE WORKERS' COMPENSATION APPEALS BOARD FAIL TO SATISFY THE REQUIREMENTS OF DUE PROCESS?

SUMMARY OF THE FACTS REGARDING NOTICE

This subject appeal arose out of a Workers' Compensation claim filed in the Workers' Compensation Appeals Board by William Liles against defendant employer Direct Transit, Inc., a South Dakota based employer, whose workers' compensation insurance carrier was Hartford Accident & Indemnity Company, hereinafter referred to as "Hartford".

Hartford was originally represented in said proceeding by Krutzsch and Associates, by David D. Bovett, whose address was One Pointe Drive, Suite 410, Brea, California 92621. An answer was filed on behalf of Hartford on February 9, 1990.

Subsequently, David D. Bovett substituted in as attorney of record on November 1, 1990, and listed his office address as 10570 Foothill Boulevard, Suite 130-102, Rancho Cucamonga, California 91730.

On November 9, 1990, David D. Bovett notified all parties of a change of address to 9650 Business Center Drive, Suite 115, Rancho Cucamonga, California 91730.

On February 7, 1991, the Workers' Compensation Appeals Board printed an updated "Official Address Record" in WCAB Case No. SBR 143098. The address for Attorney Bovett at that time was 9650 Business Center Drive, Rancho Cucamonga, California 91730.

On March 1, 1991, David D. Bovett notified all parties of another change of address to 8440 Maple Place, Rancho Cucamonga, California 91730. The change of address was duly noted on the Official Address Record by interlineation.

On May 29, 1991, a trial was held, and the Findings and Award of the Workers' Compensation Judge issued on July 3, 1991. A copy of the Findings and Award was served on parties shown on the Official Address Record which included the Appellant Hartford, and its attorney David D. Bovett.

On July 29, 1991, Appellant filed a Petition for Reconsideration as a first-level administrative appeal from the trial level proceedings. On August 20, 1991, an "Order Extending Time on Petition For Reconsideration" was filed and served by the Workers' Compensation Appeals Board, which Order Extending Time on Petition for Reconsideration was admittedly received by counsel for Hartford on August 22, 1991.

On September 13, 1991, an order denying reconsideration was issued by the Worker's Compensation Appeals Board, Reconsideration Unit, San Francisco, and was served on all parties shown on the official address record, which included Hartford and its attorney David D. Bovett, who alleges he did not receive said order.

Counsel for Hartford has not claimed that his client Hartford failed to receive the Order Denying Reconsideration.

On or about December 2, 1991, and subsequent to the issuance of the Order Denying Reconsideration on September 13, 1991, attorney Bovett again changed his official address to 1152 N. Mountain Avenue, Suite 104, Upland, California, 91786.

On February 18, 1992, attorney for Hartford filed an untimely Petition for Writ of Certiorari to review the decision denying Reconsideration.

On March 20, 1992, the Petition for Writ of Review was denied by the California District Court of Appeals as being untimely filed in that the Petition was filed more than 45 days after the Board denied the Petition for Reconsideration.

On March 30, 1992, a Petition for Review was filed with the Supreme Court of the State of California, which was denied by the Supreme Court of California, InBank, on May 13, 1992.

A copy of a letter from Thomas J. McBirnie, Assistant Secretary of the Workers Compensation Appeals Board, dated March 12, 1992, directed to Stephen M. Kelly, Clerk, Court of Appeal, Fourth Appellate District, Division Two, is attached hereto as Appendix A, and has an "Official Address Record" attached. This Official Address Record clearly indicates that both Hartford and attorney Bovett were served with copies of the Worker's Compensation Appeals Board's Order Denying Reconsideration on September 13, 1991, and that a further copy of the Worker's Compensation Appeals Board's Order was sent to attorney Bovett on December 5, 1991, to the address shown on his letterhead.

DOES THE ESTABLISHED SYSTEM OF NOTICE UTILIZED BY THE WORKERS' COMPENSATION APPEALS BOARD FAIL TO SATISFY THE REQUIREMENTS OF DUE PROCESS?

Appellant contends there is a substantial Federal question because there are allegedly recurring problems and a lack of consistency in the service of documents as prescribed by *California Administrative Code*, Title 8, §10520.

Appellant relies on the cases of *State Farm Fire & Casualty v. WCAB* (1981) 119 Cal.App.3d 193, 173 Cal.Rptr. 778, and *Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172, 63 Cal.Rptr. 78. However, each of these cases are distinguishable from the case at hand.

In the *State Farm* case, the Court of Appeals, Fourth District of California, held that a Petition for Review which was filed within 45 days after insurer first received notice of Board's Order was timely filed, even though the Order denying reconsideration was filed on June 10, 1980, and the petition for review was not filed until December 10, 1980.

The attorney for *State Farm* directed letters to the Board about the matter on July 21, 1980, September 12, 1980, and on October 13, 1980. This was supported by declarations from appropriate persons representing *State Farm* and further verified by the fact that no timely notice was received by the applicant's attorney either.

However, the Board stated to the Court of Appeals in a letter dated December 31, 1980, that although its record of service indicates that service by mail was made on June 10, 1980, the Board did not question *State Farm's* assertion that it did not obtain notice of the order until October 27, 1980, and no objection was filed by the Board.

In the present case, the letter from the assistant secretary of the WCAB dated March 12, 1992, attached hereto as Appendix A, acknowledges the inquiry by Attorney Bovett dated November 22, 1991. The address shown on that letter was 8440 Maple Place, Rancho Cucamonga, California 91730.

On December 5, 1991, the supervisor of the WCAB's "control unit" sent Attorney Bovett *another* copy of the WCAB order denying reconsideration. The address to which this copy was sent was the address shown on Attorney Bovett's letterhead and the Board's copy of the official address record of 8440 Maple Place, Rancho Cucamonga, California 91730.

It is apparent that the Board gave Appellant an additional opportunity to be heard when it sent the second order denying reconsideration on December 5, 1991, but Appellant's Petition For Review was not filed until February 18, 1992, which was well beyond the 45 day period allowed for the filing of such a petition. Therefore, the petition filed by Appellant on February 18, 1992 was not timely.

In the case of *Valley Vista Land Co. v. Nipomo Water & Sewer Co.*, supra, the Appeals Court found that the notice of entry of judgment was misaddressed to one of the parties.

Appellant in the present case does not present any allegations that the Notice of the Order Denying Reconsideration was misaddressed. Appellant's attorney alleges only that he never received notice until he received a Fax notice from Appellant's counsel, which he received on January 3, 1992.

In the *Valley Vista* case, the fact of the misdirected mail was brought to the attention of the Clerk and new notices were sent out. In the present case, on December 5, 1991, the supervisor of the WCAB's "Control Unit" sent a second copy of the Order Denying Reconsideration to attorney Bovett's address shown on his letterhead. No Petition was filed in a timely fashion.

Additionally, Appellant's Petition For Review was not summarily denied by the Fourth Appellate District and Petitioner Hartford was given an opportunity to file a supplemental declaration concerning counsel's contact with the Board and his changed addresses. This declaration was filed by Counsel for Hartford, and after consideration by the Appellate Court, Appellant's Petition was denied as being untimely. See Appendix B.

CONCLUSION

It is apparent from a careful study of the record that Appellant was given notice of the Order Denying Reconsideration, and that there has been no denial of Due Process.

Therefore, the Writ should be denied.

Dated: September 11, 1992

Respectfully submitted,

V. J. McALPIN
McALPIN, DOONAN & SEESE
211 S. Citrus
Covina, CA 91723
Attorneys for Real Party in Interest
DIRECT TRANSIT INC.

APPENDICES

APPENDIX A

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Workers' Compensation Appeals Board
455 Golden Gate Avenue
San Francisco, CA 94102
Tel: (415) 703-1870 ATSS (Calnet): 593-1870

PETE WILSON, Governor

March 12, 1992

Stephen M. Kelly
Clerk, Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

RE: 4th Civil No. E010720, Hartford Accident & Indemnity Co. v. WCAB, William Liles, et al. (WCAB Case No. 88 SBR 143098)

Dear Sir:

On February 25, 1992, the Court invited the parties in the above-referenced matter to file additional information relating to service of the WCAB's order denying reconsideration on David D. Bovett, attorney for Hartford Accident & Indemnity Company. Respondent WCAB offers the following in response to the Court's invitation.

On February 7, 1991, the WCAB printed an updated "Official Address Record" in WCAB Case No. SBR 143098. The address shown for attorney Bovett at that time was 9650 Business Center Drive in Rancho Cucamonga.

On March 7, 1991, attorney Bovett filed a notice of change of address effective March 1, 1991. The new address stated was 8440 Maple Place in Rancho Cucamonga. This change was entered on the WCAB's Official Address Record. However, the exact date when the change was entered is not shown.

On July 3, 1991, the workers' compensation judge filed and served his decision. The WCAB's Official Address Record indicates that service of the decision was made on attorney Bovett.

On July 29, 1991, attorney Bovett filed a petition for reconsideration of the workers' compensation judge's decision.

On August 20, 1991, the WCAB filed and served an Order Extending Time on Petition(s) for Reconsideration. That document indicates that service was made on attorney Bovett at 8440 Maple Place in Rancho Cucamonga.

On September 13, 1991, the WCAB filed and served its Order Denying Reconsideration. The Official Address Record indicates that service was made on attorney Bovett at 8440 Maple Place in Rancho Cucamonga. Service also was made on Hartford Accident & Indemnity Company, 2600 Eagan Woods Drive, St. Paul Minnesota. Enclosed herewith is copy of the Official Address Record made at the time of service of the WCAB's order.

On November 22, 1991, attorney Bovett wrote to the WCAB in San Francisco to state that he had not received any word from the Board since August 20, 1991. The address shown on that letter was 8440 Maple Place in Rancho Cucamonga.

On December 5, 1991, the supervisor of the WCAB's "control unit" sent attorney Bovett another copy of the WCAB's Order Denying Reconsideration. The address to which this copy was sent evidently was the address shown on attorney Bovett's letterhead and the

Board's copy of the Official Address Record, 8440 Maple Place, Rancho Cucamonga.

Meanwhile, on December 2, 1991, attorney Bovett filed another notice of change of address with the WCAB in San Bernardino. The address shown, effective November 20, 1991, was 1152 North Mountain Avenue, Upland, California. A second copy of this notice was filed with the WCAB in San Francisco on December 3, 1991.

What the foregoing indicates is (1) that both Hartford and attorney Bovett were served with copies of the WCAB's Order Denying Reconsideration on September 13, 1991, at what apparently were their correct addresses; and (2) that attorney Bovett was sent a further copy of the WCAB's order on December 5, 1991, to the address shown on his letterhead. This would appear to indicate that Hartford's petition for writ review was not timely filed.

Very truly yours,

Thomas J. McBirnie
Assistant Secretary, WCAB

TJM/ncv

Encl.

cc with enclosure:

David D. Bovett, Esq.
1152 N. Mountain Avenue
Suite 104
Upland, CA 91786

Richard D. Wooley, Esq.
303 West Mission Blvd.
Pomona, CA 91766

McAlpin, Doonan & Seese
211 So. Citrus Avenue
Covina, CA 91723

WORKERS COMPENSATION APPEALS BOARD
OFFICIAL ADDRESS RECORD

PRINTED: 02/07/91
PAGE 1

SERVICE

DOC

DATE

WCAB CASE NBR: SBR 0143098

INJURED WORKER: 092 34 3595 MOD DATE: 05 03 90
WILLIAM LILES
220 E 51ST STREET
SAN BERNARDINO CA 92404

LAWFIRM FOR INJURED WORKER JOINED: 05 03 90
RICHARD WOOLEY
303 WEST MISSION BLVD
POMONA CA 91766

EMPLOYER: JOINED: 05 03 90
DIRECT TRANSIT
P O BOX 1858
SIOUX CITY IA 51100

INSURER: JOINED: 06 07 90
HARTFORD ACCIDENT & INDEMNITY CO.
MICHAEL BAUMANN, CLAIMS DEPT
2600 EAGAN WOODS DR, SUITE 370
ST. PAUL MN 55121

LAWFIRM FOR CARRIER: JOINED: 11 13 90
DAVID D BORETT
~~9650 BUSINESS CENTER DR STE 115~~ 8440 Monte Place, Suite 101
~~RANCHO CUCAMONGA~~ CA 91730 Rancho Cucamonga Calif 91730

OTHER PARTY: JOINED: 11 13 90
UNINSURED EMPLOYERS FUND
107 S. BROADWAY ROOM 6116
LOS ANGELES CA 90012

LIEN CLAIM: JOINED: 10 03 90
LEGAL REPRODUCTIVE SERVICES
2222 W. GARVEY AVE. SOUTH #100
WEST COVINA CA 91790 0000

SEP 11 1991

V. J. McAlpin - For Employer
McAlpin, Doonan & Geese
211 So. Citrus
Covina, CA. 91723

SBRMP

APPENDIX B

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

FILED
FEB 25 1992
COURT OF APPEAL FOURTH DISTRICT

HARTFORD ACCIDENT & INDEMNITY COMPANY, Petitioner,	)	
v.	)	
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; WILLIAM LILES, DIRECT TRANSIT, INC., Respondent.	)	E010720 WCAB NO. 88 SBR 143098

THE COURT:

Good cause appearing therefor,

Respondents are invited to file a response to the petition for writ of review on file herein on or before March 16, 1992.

It appears that this court might lack jurisdiction to consider the petition as it was not filed within 45 days of the filing of the Workers' Compensation Appeals Board's order denying the petition for reconsideration. (Lab. Code, § 5950; *Southwest Airlines v. Workers' Comp. Appeals Bd.* (1991) 234 Cal.App.3d 1421.) We note that the Board's order indicating that service was made on all parties listed on the official address record is prima facie evidence that

service was properly made. In the absence of a showing that the service was defective (cf. *Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172), this court is without jurisdiction to consider the petition. (Cf. *Malloy v. Workers' Comp. Appeals Bd.* (C011921, December 24, 1991) ____ Cal.App.3d. ____ [91 Daily Journal D.A.R. 16098]; *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660.) Respondents may wish to address these points in its response.

Petitioner is invited to file a supplemental declaration which states whether counsel was on the official service list of the board and what service address he provided the Board. Counsel shall specify any and all contact between him and the Board, including phone conversations as well as written correspondence, following the receipt of the latter's order extending time on petition for reconsideration. He shall also indicate if he has changed addresses during this proceeding and what notice, if any, he has provided to the Board of such changes. This declaration shall be filed on or before March 6, 1992.

HOLLENHORST

Acting P.J.

cc:

W.C.A.B.
P.O. Box 6759
San Francisco, CA 94101 (2)

W.C.A.B.
303 W. Third St., #640
San Bernardino, CA 92401

McAlpin, Doonan & Seese
211 S. Citrus Avenue
Covina, CA 91723

Richard Wooley
303 W. Mission Blvd.
Pomona, CA 91766

Hartford Accident & Ind. Co.
2600 Eagan Woods Dr., #370
Paul, MN 55121

David D. Bovett
1152 N. Mountain St.
Ave., #104
Upland, CA 91786

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 11, 1992, I served the within *Brief In Opposition of Real Party In Interest Direct Transit, Inc.* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and Forty Copies)

DAVID D. BOVETT
Law Offices of David D. Bovett
1152 N. Mountain Avenue
Suite 104
Upland, California 91786

RICHARD D. WOOLEY
363 S. Park Avenue
Suite 300
Pomona, California 91766

Hartford Accident & Indemnity Company
2600 Eagan Woods Drive
Suite 370
St. Paul, MN 55121

Direct Transit, Inc.
P. O. Box 1858
Sioux City, Iowa 51102

William Liles
220 E. 51st Street
San Bernardino, CA 92404

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 11, 1992, at Los Angeles, California.

Betty J. Malloy
(Original Signed)